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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1957

BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR THE COMMISSIONER OF INTERNAL REVENUE

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OPINIONS BELOW

The District Court did not file an opinion. The opinion of the Court of Appeals and the separate opinions of Judges Miller and Martin, all concurring in affirming the District Court's order on the issue presented in the petition (Pet. 19–38), are reported at 241 F. 2d 374.

JURISDICTION

The order of the Court of Appeals was entered February 14, 1957. (Pet. 39.) An order of Mr. Justice Burton entered on April 26, 1957, extended the time for filing a petition for a writ of certiorari to

and including July 13, 1957. The petition for a writ of certiorari was filed on July 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, and Section 24 of the Bankruptcy Act, as amended, 11 U. S. C., Section 47.

QUESTION PRESENTED[1]

Whether a District Court, sitting in reorganization proceedings under Chapter X of the Bankruptcy Act, as amended, can render a declaratory judgment as to the tax effect of a proposed sale of debtor's assets if consummated under a proposed plan of reorganization.

STATUTE INVOLVED

28 U. S. C., c. 151, Declaratory Judgments:

> SEC. 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> * * * * *

STATEMENT

The facts material to the issue presented here are not in dispute. Inland Gas Corporation (Inland)

[1] Other questions involving the decision below are presented by the petitions in Nos. 241, 325, 336, and 342, to which a separate response has been filed in a Memorandum for the Securities and Exchange Commission.

and Kentucky Fuel Gas Corporation (Kentucky) were incorporated in 1927 and 1928, respectively. American Fuel & Power Company (American) was incorporated in 1928 for the primary purpose of acquiring the stock of these two corporations. American owns 72.6% of the stock of Inland and 91.12% of the stock of Kentucky. Inland, Kentucky, and American each had substantial issues of debt securities upon which they defaulted in 1930, and these proceedings followed, first as equity receiverships, afterward as proceedings under Section 77B of the Bankruptcy Act, and finally as a consolidated corporate reorganization proceeding under Chapter X of the Bankruptcy Act. (Pet. 3.)

After many years of receiver and trustee operation of the debtor's properties, consideration of plans for reorganization, and prolific litigation,[2] the District Court directed the trustees to make appropriate provision for public auction of the fixed assets of Inland and three subsidiaries of American with an offer to pay $6,750,000 therefor by the Texas Gas Transmission Corporation (Texas) to constitute a fair upset

[2] The past history of the debtor corporations is disclosed in the opinions of the Court of Appeals for the Sixth Circuit in *In re American Fuel & Power Co.*, 122 F. 2d 223; *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461, modification denied, 153 F. 2d 101, certiorari denied, 329 U. S. 737; *In re American Fuel & Power Co.*, 151 F. 2d 470; *In re Inland Gas Corp.*, 187 F. 2d 813; *In re Inland Gas Corp.*, 208 F. 2d 13; *In re Inland Gas Corp.*, 211 F. 2d 381, certiorari denied *sub nom. Kern* v. *Williamson*, 348 U. S. 840; *In re Inland Gas Corp.*, 217 F. 2d 207. See, also, *Vanston Committee* v. *Green*, 329 U. S. 156, affirming *In re American Fuel & Power Co.*, 151 F. 2d 470 (C. A. 6th); and *Columbia Gas Co.* v. *American Fuel Co.*, 322 U. S. 379.

price. As the upset price was in excess of the adjusted basis for federal income tax purposes of the assets which were to be sold, the trustee of Inland applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any federal income tax liability to Inland or its trustee. The trustee's position was that the Texas plan would fall within the reach of Section 337 of the Internal Revenue Code of 1954 and that no gain or loss should be recognized under its provisions. (Pet. 20.) The Commissioner issued an advisory ruling that the proposed sale would result in the recognition of gain for federal tax purposes. (Pet. 21.)

A bid was thereafter received from Tennessee Gas Transmission Company (Tennessee) offering to pay $8,000,000 in cash for the same properties. With its offer, Tennessee made a deposit of $400,000 in evidence of good faith. A new plan of reorganization was prepared which provided for the sale of the fixed assets of Inland and the subsidiaries of American at public auction to the highest bidder [3] with the Tennessee offer as a fair upset price. After the substitution of the Tennessee offer, the trustees applied to the Commissioner for a reconsideration of his ruling under the Texas plan. The Commissioner reaffirmed his former ruling.

Thereupon, the trustee of Inland and Kentucky

[3] The properties of Kentucky had already been sold. See *In re American Fuel & Power Co.*, 122 F. 2d 223, 227 (C. A. 6th).

filed a petition in the District Court praying, *inter alia* (R. 80):[4]

> that no gain or loss for purposes of federal income tax shall be recognized to Inland and to the three subsidiaries of American in connection with the sale of their respective fixed assets at public auction under the provisions of the Plan; * * *.

The District Court denied this petition, having concluded that it was without jurisdiction to entertain the petition which it considered to be in effect an application under the provisions of the Declaratory Judgment Act. (Pet. 17.) On this issue, the Court of Appeals unanimously affirmed. (Pet. 39.)

While the appeal was pending, Tennessee's offer was withdrawn (pursuant to a reservation contained in the offer) and the deposit was released. (Pet. 23.)

ARGUMENT

1. The decision below is correct. Section 2201 of the Judicial Code (*supra*, p. 2), the so-called Declaratory Judgment Act, specifically excepts from its provisions questions "with respect to Federal taxes." In this case, the trustees (R. 80) sought a determination "that no gain or loss for purposes of federal income tax shall be recognized" to the debtor corporations in connection with the proposed sale of their fixed assets and

[4] Petitioner has not filed a transcript of the record herein, but in lieu thereof has filed certified copies of the appendices filed by all parties in the Court of Appeals. (Pet. 3, fn.) Record references herein are to the Appendix to the trustees' brief in the court below.

a proposed complete liquidation to debtor's creditors. They sought that determination on the basis of their contention that Section 337 of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 337) would be applicable to such a sale and distribution. The Commissioner had rejected this contention in an informal ruling.[5]

Even on the assumption that there is involved here an "actual controversy" within the meaning of the Declaratory Judgment Act and for purposes of Article III of the Constitution (see *infra*, pp. 9–10), it is clear that the controversy, as evidenced by the petition in the District Court, is "with respect to Federal taxes."[6] It is also clear, as the courts below held, that the petition is in substance a request for a declaratory judgment. The requested judgment therefore falls squarely within the express interdiction of the Declaratory Judgment Act.

There is no merit to petitioner's contention that the exception in the Act "with respect to Federal taxes" is not applicable in a bankruptcy proceeding. He

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[5] Such rulings by the Commissioner are merely advisory. *Couzens* v. *Commissioner*, 11 B. T. A. 1040, 1052–1053, 1148–1150; *Avco Manufacturing Corp.* v. *Commissioner*, 25 T. C. 975, 983, 986.

[6] *Red Star Yeast & Products Co.* v. *La Budde*, 83 F. 2d 394, 396 (C. A. 7th); *Beeland Wholesale Co.* v. *Davis*, 88 F. 2d 447 (C. A. 5th), certiorari denied, 300 U. S. 680; *Murphy* v. *Graves*, 120 F. 2d 243 (C. A. 6th), certiorari denied *sub nom. Murphy* v. *Brady*, 314 U. S. 661; *Tomlinson* v. *Smith*, 128 F. 2d 808 (C. A. 7th); *Wilson* v. *Wilson*, 141 F. 2d 599 (C. A. 4th); *Royce* v. *Squire*, 168 F. 2d 250 (C. A. 9th); *Noland* v. *Westover*, 172 F. 2d 614 (C. A. 9th), certiorari denied, 337 U. S. 938; *Taylor* v. *Allan*, 204 F. 2d 485 (C. A. 10th).

cites no case so holding.[7] To the contrary, as Judge Martin so aptly pointed out below (Pet. 35), the *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not Congress has *withdrawn* from the courts of the United States the jurisdiction to adjudicate tax matters by the declaratory judgment procedure. That it has done so is clearly indicated by the history of the Declaratory Judgment Act. As originally enacted, it did not contain the exception "with respect to Federal taxes." This exception was added as an amendment by Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014, 1027. The committee reports[8] state that the amendment was added to make it clear that the Act had no application to federal taxes; that the application of the Act to taxes would constitute a radical departure from a long-continued policy of Congress as

[7] Three of the five cases cited by petitioner (Pet. 10–11) did not involve taxes. *Mosser* v. *Darrow*, 341 U. S. 267; *Continental Illinois National Bank* v. *Chicago R. I. & P. Ry. Co.*, 294 U. S. 648; *Burco, Inc.* v. *Whitworth*, 81 F. 2d 721 (C. A. 4th). Of the remaining two cases, one was decided in 1917 long prior to enactment of the Declaratory Judgment Act. *Scott* v. *Western Pac. R. Co.*, 246 Fed. 545 (C. A. 9th) (cited in the petition as *Collector* v. *Western Pacific R. R. Co.*). The fifth case—a district court decision—involved the question of whether the trustee, as an officer of the court, should file certain returns. *In re Town Crier Bottling Co.*, 123 F. Supp. 588 (E. D. Mo.). Moreover, the last two cases concerned *past* financial transactions—not (as here) hypothetical transactions which might occur in the future. See *infra*, pp. 8–10.

[8] S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 651, 657). See, also, H. Conference Rep. No. 1885, 74th Cong., 1st Sess., p. 13 (1939–1 Cum. Bull. (Part 2) 660, 666).

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expressed in Rev. Stat. 3224 [9] and other provisions with respect to the determination, assessment, and collection of federal taxes; and that existing procedures afforded ample remedy for the correction of tax errors.[10]

2. In any event, there is not involved here an "actual controversy" within the meaning of the Declaratory Judgment Act and for purposes of Article III of the Constitution. Stated otherwise, even apart from the Act's exception "with respect to Federal taxes," the District Court was without jurisdiction to adjudicate the tax consequences of the proposed sale.

The controlling principles were well stated by Mr. Chief Justice Hughes for a unanimous Court in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241:

> The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.
>
> A "controversy" in this sense must be one that is appropriate for judicial determination.

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[9] This statute prohibited suits to restrain the assessment or collection of any federal tax. The prohibition has been carried forward into Section 7421, Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 7421). In this connection, it should be noted that, while the question has not been raised in the petition here, the trustee in his petition in the District Court also prayed that the officers and agents of the United States be enjoined from asserting or collecting any tax with respect to the proposed sale. (R. 80–81.) The courts below held that there were no exceptional and extraordinary circumstances which would permit an exception to the application of Section 7421. (Pet. 25, 31, 37–38.)

[10] See note 11, *infra*.

> * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. [Citations omitted.]

See also, *e. g., Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264; *Muskrat* v. *United States*, 219 U. S. 346.

In the instant case, the trustees were not seeking an adjudication of tax liability with respect to past transactions.[11] On the contrary, they were seeking merely "an opinion advising what the law would be upon a hypothetical state of facts"—namely, what the tax consequences would be *if* the proposed plan (with its provision for sale of the assets) were approved and *if* the proposed vendee (Tennessee) ad-

[11] Sections 64 (a) (4) and 102 of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended (11 U. S. C. 1952 ed., Secs. 104 (a) (4) and 502), together give the bankruptcy court jurisdiction to determine the amount and legality of any tax assessed against a bankrupt, whether assessed before or after bankruptcy (see *Cohen* v. *United States*, 115 F. 2d 505 (C. A. 1)); and any taxes assessed must be collected by claims filed in the bankruptcy court. See Section 6871 of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 6871). In such circumstances, there is no reason why the court should exercise declaratory jurisdiction even had it not been excepted by the Declaratory Judgments Act. See *Great Lakes Co.* v. *Huffman*, 319 U. S. 293.

hered to its offer. As it developed, the plan was rejected by the District Court and Tennessee's offer was withdrawn (pursuant to a reservation contained in the offer.) Moreover, the trustees themselves would have presumably urged rejection of the plan if the tendered tax question had been decided adversely to them. In these circumstances, the trustees' petition plainly did not present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character * * *."

CONCLUSION

The decision below is correct; there is no conflict; and no other reason appears which would warrant review. Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

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